

United States District Court
Southern District of Texas
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JUL 07 1998

Michael N. Milby
Clerk of Court

AMERICAN DENTAL
TECHNOLOGIES, INC.
Plaintiff,

vs.

KREATIV, INC.
Defendant.

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#115
CIVIL ACTION NO. C-97-374

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF
NONINFRINGEMENT OF PATENT 5,350,058**

On this day came on to be considered Defendant Kreativ, Inc.'s ("Kreativ") Motion for Summary Judgment of Noninfringement of U.S. Patent 5,350,058 against Plaintiff American Dental Technologies, Inc. ("ADT"). For the reasons stated herein, the Court DENIES the Motion.

I. JURISDICTION

This action was filed in federal court based on assertions of patent violations and unfair competition which arise under the laws of the United States and over which this district court has original jurisdiction pursuant to 28 U.S.C. § 1338.

II. FACTS AND PROCEEDINGS

Both ADT and Kreativ manufacture and sell dental devices, and more specifically both manufacture and sell air abrasive systems which are used in the practice of dentistry for cutting, excavating, abrading, and etching teeth or associated tooth structures by means of finely divided abrasive materials carried in a gas or fluid stream.

On July 7, 1997, ADT filed the present action alleging that Kreativ infringed and induced others to infringe ADT's patented

devices. Specifically, ADT alleges that it is the owner of the entire right and title to (1) United States Letter Patent No. 5,275,561 entitled "Method for Preparing Tooth Structure for Bonding" ("the '561 patent"); (2) United States Letter Patent No. 5,350,299 entitled "Dental Treatment System" ("the '299 patent"); and (3) United States Letter Patent No. 5,525,058 entitled "Dental Treatment System" ("the '058 patent"). ADT further alleges that Kreativ has (1) induced others to infringe claims 10 and 19 of the '561 patent; (2) infringed claim 1 of the '299 patent; and (3) infringed claims 1 through 4 of '058 patent.

On May 15, 1998, Kreativ filed the instant Motion for Summary Judgment on the grounds that Kreativ's accused products do not infringe upon ADT's '058 patent. On June 12, 1998, ADT filed a Response in opposition to the Motion. On June 19, 1998, Kreativ filed a Reply to ADT's Response. The Court now considers the Motion.

III. DISCUSSION

A. Standard of Review

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Petrolite Corp. v. Baker Hughes, Inc., 96 F.3d 1423, 1425 (Fed. Cir. 1996). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); Avia Group Int'l v. L.A. Gear Cal., Inc., 853 F.2d 1557, 1560 (Fed. Cir. 1988).

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

If the nonmovant bears the burden of proof, the moving party may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. Celotex Corp., 477 U.S. at 325, 106 S. Ct. at 2553; Johnston v. IVAC Corp., 885 F.2d 1574, 1577 (Fed. Cir. 1989). If the movant bears the burden of proof on a claim or defense on which it is moving for summary judgment, the movant must come forward with evidence that establishes "beyond peradventure all the essential elements of the claim or defense to warrant judgment in [its] favor." Fontenot v. UpJohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis original). Once the moving party has carried its burden, the nonmovant "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

Summary judgment evidence is subject to the same rules that govern admissibility of evidence at trial. Resolution Trust

Corp. v. Starkey, 41 F.3d 1018, 1024 (5th Cir. 1995) (citing Munoz v. International Alliance of Theatrical Stage Employees, 563 F.2d 205, 207 n. 1 (5th Cir. 1977)). In considering a motion for summary judgment, the court cannot make credibility determinations, weigh the evidence, or draw inferences for the movant. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513. However, the court must draw all justifiable inferences from the summary judgment evidence in the light most favorable to the nonmovant. Id. at 255, 106 S. Ct. at 2513; Pasant v. Jackson Nat'l Life Ins. Co., 52 F.3d 94, 96 (5th Cir. 1995).

Thus, the motion of an accused infringer for judgment on the ground of non-infringement of a patent may be granted where the patentee's proof is deficient in meeting an essential part of the legal standard for infringement. Johnston, 885 F.2d at 1577.

B. Patent Infringement

One who makes, uses or sells another's patented invention within the United States is liable for infringement. 35 U.S.C. §§ 154, 271(a); Buehler AG v. Ocrim S.p.A., 836 F. Supp. 1305, 1319 (N.D. Tex. 1993), aff'd, 34 F.3d 1080 (Fed. Cir. 1994). Patent infringement actions require a two-step analysis: (1) the patent claims must be properly construed to determine their scope and meaning, and (2) the patent claims as properly construed must be compared to the accused device or process. Carroll Touch, Inc. v. Electro Mechanical Systems, Inc., 15 F.3d 1573, 1576 (Fed. Cir. 1993).

In part (f) of Claim 1, the '058 patent claims a pressure

control means comprised of

a servo valve having a fluid inlet, a fluid outlet, electrically controllable valve means positioned between said fluid inlet and said fluid outlet, and an electrical control terminal, said valve means being responsive to changes in the level of an electrical command signal at said electrical control terminal for adjusting said valve means to any selected one of a plurality of selected conditions, to set said pressure of said fluid supplied to said abrasive-mixing means to any of a corresponding plurality of selected pressure values.

(U.S. Patent No. 5,525,058 at Column 20, Debruine Decl. Ex. 2.)

In the instant Motion, Kreativ asserts that it does not infringe the '058 patent because its accused devices do not have servo valves.

1. Claim Interpretation

Patent claim interpretation is a matter of law for the judge, not the jury, to determine. Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995) (en banc), aff'd, -- U.S. --, 116 S.Ct. 1384 (1996). Thus, "[a] patent covers the invention or inventions which the court, in construing its provisions, decides that it describes and claims." Markman, 52 F.3d at 979 (quoting 3 William C. Robinson, The Law of Patents for Useful Inventions § 1019, at 247 (1890)).

To ascertain the meaning of claims, the Court considers

three sources: the claims, the specification, and the prosecution history. Unique Concepts, Inc. v. Brown, 939 F.2d 1558, 1561 (Fed. Cir. 1991). Expert testimony, including evidence of how those skilled in the art would interpret the claims, may also be used. Fonar Corp. v. Johnson & Johnson, 821 F.2d 627, 631 (Fed. Cir. 1987).

Claims must be read in view of the specification, of which they are a part. Markman, 52 F.3d at 979. The specification contains a written description of the invention that must enable one of ordinary skill in the art to make and use the invention. 35 U.S.C. § 112. For claim construction purposes, the description may act as a sort of dictionary, which explains the invention and may define terms used in the claims. Markman, 52 F.3d at 979. A patentee is free to be his or her own wordsmith, however, any special definition given to a word must be clearly defined in the specification. Intellicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1388 (Fed. Cir. 1992).

To construe claim language, the court should also consider the patent's prosecution history. Markman, 52 F.3d at 980 (citing Graham v. John Deere Co., 383 U.S. 1, 33, 86 S. Ct. 684, 701 (1966)). This "undisputed public record" of proceedings in the Patent and Trademark Office is of primary significance in understanding the claims. Id. Although the prosecution history can and should be used to understand the language used in the claims, it cannot "enlarge, diminish, or vary" the limitations in the claims. Goodyear Dental Vulcanite Co. v. Davis, 102 U.S.

222, 227 (1880); Intervet Am., Inc. v. Kee-Vet Labs., Inc., 887 F.2d 1050, 1054 (Fed. Cir. 1989).

Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises; this evidence may be helpful to explain scientific principles, the meaning of technical terms, and terms of art that appear in the patent and prosecution history. Markman, 52 F.3d at 980. Extrinsic evidence is useful "to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent." Id. (quoting Brown v. Piper, 91 U.S. 37, 41 (1875)). However, the trial court has discretion to decide whether expert assistance is necessary to understand a patent. Seattle Box Co. v. Industrial Crating & Packing, Inc., 731 F.2d 818, 826 (Fed. Cir. 1984). Further, a district court's claim construction, enlightened by such extrinsic evidence as may be helpful, still must be based upon the patent and prosecution history. Markman, 52 F.3d at 981. Extrinsic evidence is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims. U.S. Indus. Chems., Inc. v. Carbide & Carbon Chems. Corp., 315 U.S. 668, 678, 62 S. Ct. 839, 844 (1942); Markman, 52 F.3d at 981.

Claim 1 defines a servo valve as a "valve ...responsive to changes in the level of an electrical command signal ... to set [the] pressure..." (U.S. Patent No. 5,525,058 at Column 20, Debrune Decl. Ex. 2.) In the detailed description, the '058

patent states that the preferred embodiment of the servo valve be
a

valving arrangement which can be set by a command voltage to a variety of states in which it produces different pressures in its output flow of fluid. The valve also includes a sensor which senses the valve output pressures to produce an internal feedback voltage indicative of output pressure, compares the feedback voltage with the command voltage to produce an error signal, and moves the valving mechanism in the direction to reduce this error to substantially zero, thus assuring that the commanded output pressure is produced.

(U.S. Patent 5,525,058 at Column 18, Debrune Decl. Ex. 2.)

Based on the language of the patent itself and having examined the prosecution history and the extrinsic evidence of record, the Court concludes that the term "servo valve" as contained in the '058 patent means a valving mechanism that controls output (i.e. pressure) in response to an electrical command signal.

2. Comparison to Accused Devices

Once the claim has been construed by the court, the patent claims as properly construed must be compared to the accused device or process. Markman, 52 F.3d at 976; Carroll Touch, 15 F.3 at 1576. A patent claim covers the accused device if the accused device embodies every limitation of the claim, either

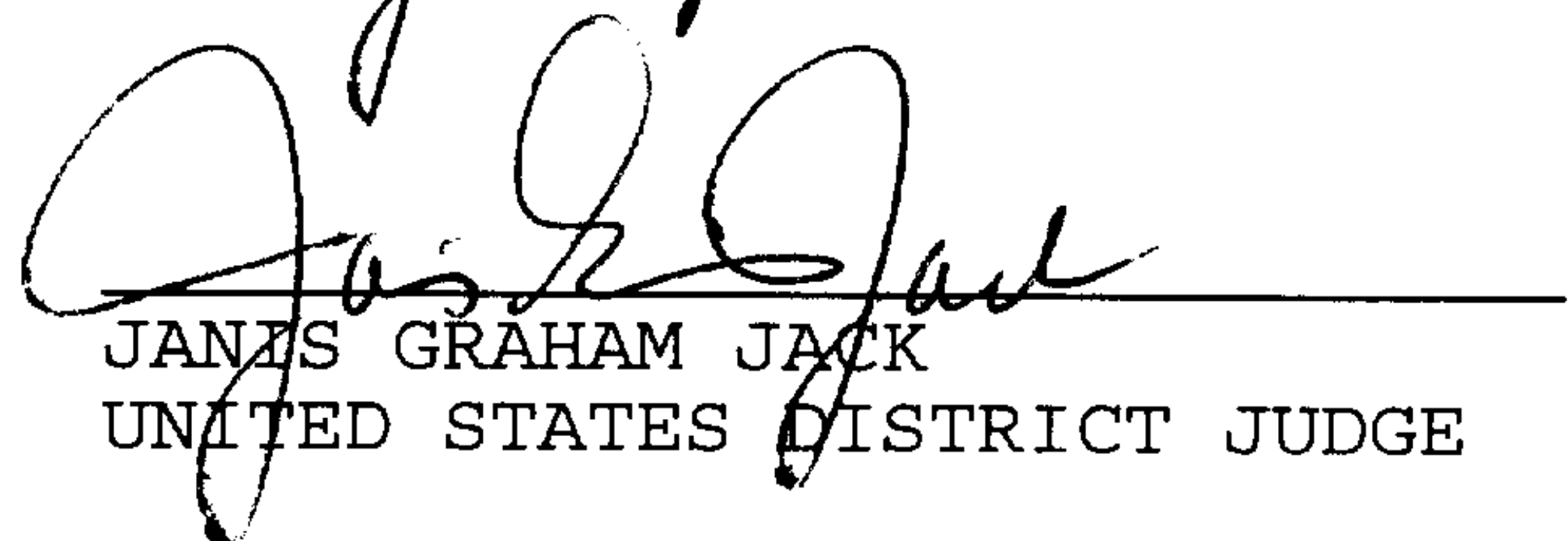
literally or by an equivalent. Read Corp. v. Protec, Inc., 970 F.2d 816, 822 (Fed. Cir. 1992). This second step of the inquiry, comparing the properly construed claim with the accused product, is a question of fact. See CVI/Beta Ventures, Inc., v. Tura LP, 112 F.3d 1146, 1152 (Fed. Cir. 1997).

Kreativ asserts that its accused devices cannot, as a matter of law, infringe upon the '058 patent since its devices do not contain servo valves, and submits the Declaration of Joe Forehand in support of its assertion. (See Forehand Decl. ¶ 8.) ADT asserts that the accused devices do contain servo valves, and submits the Declaration of Eddie Harmon in support of its assertion. (See Harmon Decl. ¶¶ 4-8.) Accordingly, the Court finds that a genuine issue of material fact exists as to whether the Mach 5.0 and the Mach 5.0 Plus read on the '058 patent.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Kreativ's Motion for Summary Judgment of Non-infringement as to the '058 patent.

ENTERED on this the 6th day of July, 1998.


JAMES GRAHAM JACK
UNITED STATES DISTRICT JUDGE